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Supreme Court, U.S.
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No. 04-1285

IN THE

Supreme Court of the United States

CHRISTOPHER L. FALCONE,

Petitioner,

v.

UNIVERSITY OF MINNESOTA
and THE BOARD OF REGENTS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Did the United States Court of Appeals for the Eighth Circuit commit reversible error in affirming the District Court's grant of summary judgment in favor of the University of Minnesota on Petitioner's claim of disability discrimination under the Rehabilitation Act where the undisputed evidence is that the decision to dismiss Petitioner from the Medical School was based solely on the fact that he was academically unfit and where there was no evidence of pretext or bad faith on the part of the Medical School?

(2) Did the United States Court of Appeals for the Eighth Circuit commit reversible error in affirming the District Court's grant of summary judgment in favor of the University of Minnesota on Petitioner's claim of disability discrimination under the Rehabilitation Act where the undisputed evidence is that the Petitioner was not otherwise qualified for continued enrollment in the Medical School program and there was no evidence that a reasonable accommodation existed that would have rendered him otherwise qualified for continued enrollment in the Medical School program?

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RESPONDENT UNIVERSITY OF MINNESOTA'S BRIEF IN OPPOSITION TO CHRISTOPHER FALCONE'S PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The United States Court of Appeals for the Eighth Circuit and the United States District Court for the District of Minnesota accurately stated the pertinent, undisputed facts related to Petitioner's claim. [Pet. App. A and B]. Petitioner was dismissed from the University of Minnesota Medical School because despite receiving requested accommodations for his claimed disability, Petitioner failed a total of 12 courses and was demonstrably unable to synthesize clinical data so that he could safely, properly and competently care for patients, an essential requirement of the Medical School program. Based on his overall academic record, the Medical School concluded that Petitioner was not otherwise qualified to remain enrolled and he was dismissed in March 2000.

CLARIFICATION OF THE RECORD

The "facts" recited in the Petition bear little resemblance to the facts in the record below.[1] Petitioner has a long history of difficulty, struggle, excuses and failure during his enrollment at the Medical School.

During the classroom portion of the Medical School curriculum, Petitioner encountered immediate problems.

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1. The Court should strike Appendix E from the Petition because it contains additional facts and argument in an obvious attempt to circumvent the page limitations set forth in Sup. Ct. R. 33.

Faced with the possibility of failing all of his courses during his first semester of enrollment, he appeared before the Committee on Student Scholastic Standing ("COSSS") of the Medical School and decelerated to a half-time student. Less than a year later, he again appeared before the COSSS because he failed Human Genetics and did not meet other academic requirements.

Thereafter, and despite the acknowledged receipt of accommodations for his claimed disability, Petitioner failed Clinical Medicine II, Pathophysiology II and Pathophysiology IV. The Medical School relaxed its own rules to allow him to remediate these failures, but noted that his professors consistently criticized his poor clinical skills.

When Petitioner began the clinical science portion of the Medical School curriculum, his problems became even more pronounced. He immediately failed Pediatric Neurology. Although not required to do so, the COSSS allowed him an opportunity to remediate that failure with additional accommodations. Petitioner then failed Clinical Medicine IV. The COSSS again allowed him an opportunity to remediate that failure with further accommodations. Petitioner then failed three more clinical courses: Emergency Medicine, Advanced Medicine and Renal Consult.

After a lengthy dismissal hearing, the COSSS unanimously voted to dismiss Petitioner from the Medical School. The COSSS based its decision on two factors: (1) Petitioner received appropriate accommodations in the Emergency Medicine rotation as requested by him through Disability Services and nevertheless failed the course; and (2) Petitioner was unable to demonstrate, with or without accommodations, that he could synthesize data in a clinical

setting to perform clinical reasoning, which is an essential element of functioning as a medical student and ultimately as a physician.

The accommodations Petitioner requested, and received, failed to rectify his clinical deficiencies. Even in the courses where he admits he received the requested accommodations, such as Renal Consult and in his second attempt at Clinical Medicine IV, his supervising instructors specifically concluded that Petitioner was unable to process clinical information such that he could safely and competently treat patients. Petitioner was not otherwise qualified for continued enrollment in the Medical School program.

REASONS FOR DENYING THE PETITION

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Petitioner failed to present any compelling reason for this Court to exercise discretionary jurisdiction. This case does not present a decision of the Eighth Circuit Court of Appeals that is in conflict with a decision of this Court or another circuit court of appeals on an important matter. Indeed, the Court of Appeals panel reached its unanimous decision by relying on well-settled and longstanding authority from this Court and derivative authority as set forth by the Eighth Circuit.

The University and the Medical School are state institutions accountable to the public for assuring the competence of its graduates as physicians. Patients of University of Minnesota Medical School graduates, and the public at large, do and must reasonably rely on the competence of such graduates to understand medical conditions and diagnose and treat them.

The administration and faculty of the Medical School must have discretion to determine whether a student should be able to publicly hold himself out to be a physician graduate of the institution and thereby placed in the front lines of medical care, directing courses of treatment and the actions of clinic and hospital staff. Both legal liability and patient health and safety depend on the University Medical School making these decisions wisely.

That is why this Court has repeatedly granted broad deference to these academic judgments and, particularly, in the medical school context. *See Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90 (1978). Petitioner has not presented any compelling reason for the Court to revisit or reevaluate the principle that an academic institution has the discretion to determine the qualifications of its own students. Instead, this case is simply about whether the lower courts properly determined whether any genuine issue of material fact precluded summary judgment in favor of the University. Petitioner's assertion that summary judgment was improper because factual disputes existed is both incorrect and not the type of "compelling reason" that justifies granting a Petition for Writ of Certiorari. This Petition falls squarely within the category of cases for which certiorari is rightly denied. Sup. Ct. R. 10.

I. Petitioner Has Not Articulated A Compelling Reason To Justify Discretionary Review By This Court.

This Court has consistently upheld the right of an academic institution to render judgment regarding the qualifications of its students. "University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to

promotion and graduation." *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 225 n.11 (1985) (quotation omitted). Accordingly,

> [w]hen judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Id. at 225; *see also Horowitz*, 435 U.S. at 90, 96 n.6 (1978) (Powell, J., concurring). In 2003, this Court reaffirmed its longstanding tradition of affording deference to academic institutions in determining the qualifications of its students, even under the strictest constitutional scrutiny. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

Writing in the context of the University of Missouri's academic dismissal of a medical student, this Court recognized the basis for affording such deference:

> The decision to dismiss respondent . . . rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress towards that goal. . . . Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not

> readily adapted to the procedural tools of judicial or administrative decisionmaking.

Horowitz, 435 U.S. at 89-90.

Petitioner repeatedly advocated that the courts below apply the academic deference rule but find that the record facts supported his assertion that the decision of the Medical School was in bad faith. The Eighth Circuit applied the academic deference rule and found that the decision of the Medical School was not in bad faith, pretextual or based on anything other than genuine concern about Petitioner's ability to synthesize clinical data. [Pet. App. A at 6a-7a]. Petitioner should not be permitted to change his position regarding the applicable academic deference rule now because ordinarily, this Court "does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

Petitioner urges this Court to depart from the well-settled academic deference rule in favor of a more limited deference as adopted in *Wong v. Regents of the Univ. of California*, 192 F.3d 807 (9th Cir. 1999) and *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791 (1st Cir. 1992). The rules in *Wong* and *Wynne* are inapposite because they relate to the level of deference to be afforded an institution that declined to provide accommodations at all. Here, on the other hand, the parties agreed on accommodations, the Medical School administered those accommodations, but Petitioner claims the delivery of the accommodations was imperfect.

Even if the Medical School imperfectly delivered accommodations to Petitioner, that alone is not enough to revoke the deference afforded to the demonstrably academic

decisions of the Medical School. Petitioner has not and cannot show that, as required by *Ewing*, the Medical School departed from accepted academic norms or failed to exercise professional judgment. The Eighth Circuit properly applied this rule to find that there was no evidence that the decision of the Medical School was pretextual, in bad faith or based on anything other than the objective evidence that Petitioner was academically unfit. The Court has a well-established history of affording deference to such decisions and there is no compelling reason to change this rule.

II. Petitioner Was Not Otherwise Qualified To Remain In Medical School.

Even under Petitioner's manipulated interpretation of the academic deference rule, summary judgment was properly granted against Petitioner. Petitioner failed to establish the existence of a reasonable accommodation that would have rendered him qualified for continued enrollment in the Medical School program. *See Southeastern Cmty. College v. Davis*, 442 U.S. 397, 406 (1979) (holding that individual must meet all requirements of the program in spite of disability); *School Bd. of Nassau County v. Arlene*, 480 U.S. 273, 287 n.17 (1987) (finding individual may become otherwise qualified with provision of reasonable accommodations).

There is no evidence that Petitioner would have become otherwise qualified had the accommodations been perfectly implemented. The Medical School in good faith administered countless accommodations to Petitioner, the result of which had little or no affect on his ability to synthesize patient data such that he could provide competent and safe patient care. Petitioner praised the accommodations he received in Renal

Consult and in his second attempt at Clinical Medicine IV, but in both courses, his supervising instructors concluded that Petitioner was unable to synthesize clinical data and expressed serious reservations about his clinical abilities as a medical student and ultimately as a physician.

Petitioner urges the Court to expand liability under the Rehabilitation Act and adopt a rule of law not recognized in any jurisdiction. [Pet. at 28] Under Petitioner's rule, an academic institution would be liable under the Rehabilitation Act any time it imperfectly administers accommodations to a student, even in cases where there is no evidence of pretext or bad faith and even if, in the academic judgment of the institution, the student is not suitable to be a physician and the provision of additional accommodations would be a hopeless exercise. The legislation does not extend to such absurd lengths.

The Rehabilitation Act does not require the Medical School to provide Petitioner with endless opportunities to succeed when he was demonstrably inept. He failed 12 courses while enrolled in the Medical School. Petitioner is unable to synthesize clinical data such that he can properly and safely treat patients and therefore is not qualified to receive a Medical Degree. The Medical School is not legally required to create a program that would enable Petitioner to earn a degree without satisfactorily demonstrating that he was otherwise qualified for the program.

CONCLUSION

The University of Minnesota respectfully requests that the Court deny the Petition.

Respectfully submitted,

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